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The Assistance of Counsel and The Warren Court: Post-Gideon Develoments in Perspective

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I. INTRODUCTION

Much controversy over the performance of the "Warren Court"[1] in the area of criminal procedure has focused on decisions expanding the constitutional right to the assistance of counsel. During the tenure of the Honorable Earl Warren as Chief Justice of the United States, the Supreme Court identified a number of "critical" stages in the criminal process from custodial interrogation to appeal and held that irrespective of a defendant's financial resources, the services of a defense attorney must be made available at each of these stages. Few have disagreed with Mr. Justice Hugo L. Black's assertion that the ideal of justice cannot be

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1. A name commonly used to refer to the United States Supreme Court during the tenure of the Honorable Earl Warren as Chief Justice of the United States, October 5, 1953, to June 23, 1969.

achieved "where the kind of trial a man gets depends on the amount of money he has."[2] At the same time, many critics of the Supreme Court have expressed alarm over its departure from traditional views about the dimensions of the adversary system. In recent years a Supreme Court majority has recognized that, as a practical matter, the adversary system often goes into operation well in advance of the filing of formal charges[3] and in many cases extends beyond the trial itself to an initial appeal of the conviction.[4]

In attempting to assure access to defense counsel at "critical" stages in the criminal process, the Supreme Court has frequently objected to various methods of police investigation widely practiced throughout the country. In *Miranda v. Arizona*,[5] for example, Mr. Chief Justice Warren bluntly asserted that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[6] He was not referring specifically to the "third degree" or to any particular form of direct police pressure, but rather to the practice of private interrogation as a technique of law enforcement. It is not surprising that such criticism, accurate or otherwise, has aroused strong resentment in law enforcement circles—resentment that has often taken the form of a bitter counterattack in which the Supreme Court is portrayed as a collective coddler of criminals. To many police officers such decisions as *Escobedo v. Illinois*[7] and *Miranda v. Arizona*[8] probably appear as nothing more than attempts on the part of nonprofessionals, with misplaced concern for the rights of criminals, to foul up the machinery of law enforcement.[9] The prosecutor, whose professional reputation may be identified with a conviction rate, is likely to hold similar views. In any event there is widespread opposition among law enforcement officials to a form of appellate review in which police error often leads to the reversal of convictions irrespective of the evidence of guilt.[10]

Strong opposition to Supreme Court rulings in the field of criminal procedure has also been voiced by many individuals and groups within the general public. One study shows a marked increase between 1964 and 1966 in public awareness of Supreme

2. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
3. Cases cited and discussed at notes 39-80 and accompanying text *infra*.
4. Cases cited and discussed at notes 81-113 and accompanying text *infra*.
5. 384 U.S. 436 (1966).
6. Id. at 455-56.
7. 378 U.S. 478 (1964).
8. 384 U.S. 436 (1966).
9. *See generally* J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966).
10. *See* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Court*, 49 CORNELL L.Q. 436 (1964).

Court activity in the field of criminal procedure,[11] and title II of the Omnibus Crime Control and Safe Streets Act of 1968[12] reflects intense anti-Court sentiment in Congress that apparently received substantial popular support.[13] It should be noted that some of the Warren Court's most far-reaching efforts to extend procedural safeguards to indigent, uninformed and inexperienced defendants occurred during a period marked by assassination, urban riots and a highly publicized increase in the rate of violent crimes generally. At such a time, popular reaction can be expected to go beyond the merits of particular cases or exact questions of procedure and to be expressed in sweeping denunciations of the Court. In addition it is well to remember that much of the criticism directed toward decisions involving criminal procedure may chiefly result from long-standing dissatisfaction with judicial performance in other areas, notably public school desegregation and subversive activities.

Whatever its causes, criticism of the Warren Court, and especially of its decisions respecting criminal procedure, led to a confrontation that some compared with the "court-packing" episode of 1937.[14] In June, 1968, Congress enacted and President Johnson signed legislation aimed at overturning Supreme Court decisions on police interrogation and line-up identification, as applied to federal cases.[15] The successful effort to block Senate confirmation of the nomination of Abe Fortas as Chief Justice of the United States reflected, among other things, the same hostile sentiment. Supreme Court performance in the realm of criminal procedure was a widely publicized issue in the 1968 presidential campaign. President Nixon's recent appointment of Warren E. Burger as the new Chief Justice of the United States and his consecutive nominations of Judges Clement H. Haynsworth and G. Harrold Carswell

11. Murphy and Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 362 (1968). *See generally* McIntyre, *Public Attitudes Toward Crime and Law Enforcement*, 374 ANNALS 34 (1967).

12. Act of June 19, 1968, Pub. L. No. 90-351, tit. II, § 3501A, 82 Stat. 210.

13. *See* Stephens, *Police Interrogation and the Supreme Court: An Inquiry into the Limits of Judicial Policy-Making*, 17 J. PUB. L. 241, 250-52, 254-55 (1968).

14. *See* New York Times, May 26, 1968, § 4, at E-15.

15. Deleted from the original Senate version of this measure were much broader restrictions on federal judicial power. One of these sought to abolish the jurisdiction of the Supreme Court and lower federal courts to review decisions of the highest state courts admitting confessions into evidence on grounds of voluntariness. See S. 917, 90th Cong., 2d Sess., tit. II as reported by the Committee on the Judiciary, April 29, 1968.

to fill the vacancy created by the resignation of Mr. Justice Fortas have been widely interpreted as further reflection of dissatisfaction with judicial trends of the recent past.

Some members of Congress have alleged a direct causal relationship between Supreme Court decisions—several of them in the right-to-counsel area—and a rising crime rate.[16] Apart from the vast oversimplification implicit in such a charge, this contention is in sharp conflict with the findings of empirical studies designed to assess the impact of new police interrogation requirements on the day-to-day administration of criminal justice.[17] It is true that these studies are not conclusive and that very little systematic examination of the impact of other procedural rules has been undertaken. Nevertheless, there is little if any support for the contention that Supreme Court decisions have contributed to an increase in crime or even that they have resulted in the release of a significant number of "known criminals."[18]

More important than the validity of such claims, however, is their wide appeal and the intensity with which they are advanced. Several recent decisions aimed at protection of the rights of indigents, chiefly by facilitating their access to counsel, are among the most controversial rulings in the modern history of the Supreme Court.[19] Ironically, this is true even though such decisions do not benefit leaders of organized crime who have ready access to skilled legal counsel, or affluent suspects outside the ranks of organized crime. Even assuming for the moment that these decisions have been implemented on a widespread basis, the persons most likely to be materially affected are poor, uneducated, or in some other way at a serious disadvantage when compared with other defendants.

In addition to the broad social and political factors already noted, further insight into the controversy surrounding these decisions may be derived from examining (1) the substance and scope of recent extensions of procedural rights, (2) the Supreme

16. *See* 114 CONG. REC. 4749, 5827 (daily ed. May. 17, 1968) (remarks of Senator McClellan); *Hearings on S. 674 Before the Subcom. on Criminal Laws and Procedures of the Committee on the Judiciary*, 90th Cong., 1st Sess., at 192 (1967).

17. *See* Medalie, Zietz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). *See also* THE IMPACT OF SUPREME COURT DECISIONS 149-75 (T. Becker ed. 1969).

18. For a comprehensive analysis of factors generally identified with the apparent increase of various types of crime in recent years see THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967).

19. For an indication of the intensity of controversy in this area see *Hearings on S. 674 Before the Subcom. on Criminal Laws and Procedures of the Committee on the Judiciary*, 90 Cong., 1st Sess. (1967).

Court's stated reasons, constitutional and otherwise, for the enlargement of these rights, and (3) the implications of recent decisions for the administration of criminal justice in general and for the adversary system in particular. This study focuses on these three questions by analyzing the Warren Court's development of the constitutional right to the assistance of counsel from its landmark 1963 decision in *Gideon v. Wainwright*[20] through the close of its final term on June 23, 1969. The heated debate over the Court's performance in this area may be more clearly understood by identifying the dimensions of the new requirements and by examining major policy implications underlying them. The purpose here is to analyze and evaluate judicial performance, as reflected primarily in Supreme Court opinions.

The Warren Court regarded the assistance of counsel as an indispensable prerequisite to the exercise of other rights that have also been broadened in recent years. In particular the fifth amendment privilege against self-incrimination and the sixth amendment right of confrontation have been closely identified with the right to counsel.[21] Consequently, it would be a mistake to view the growth of this protection merely as one of several independent threads of development. The close inter-connections between the right to counsel and several other provisions of the Bill of Rights are reflected in many of the cases examined in the following pages.

With its decision in *Gideon v. Wainwright*[22] the Supreme Court erased virtually all differences between the scope of the right to counsel as applied by the sixth amendment to federal prosecutions[23] and as applied to the states by the fourteenth amendment. During the twenty years preceding this decision, the Supreme Court had used the due process rationale of *Betts v. Brady*[24] to determine the indigent defendant's right to be provided with counsel in non-capital cases arising from the states. With its emphasis on "an appraisal of the totality of facts" in each case, the *Betts* standard permitted great flexibility of judicial interpretation.[25] This flexibility, of course, was accompanied by confusion and uncertainty, but the general drift of Supreme Court decisions tended to widen the right to counsel as an element of due

20. 372 U.S. 335 (1963).
21. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Brookhart v. Janis, 384 U.S. 1 (1966); Pointer v. Texas, 380 U.S. 400 (1965).
22. 372 U.S. 335 (1963).
23. Johnson v. Zerbst, 304 U.S. 458 (1938).
24. 316 U.S. 455 (1942).
25. *Id.* at 462.

process.[26] Rejecting the *Betts* approach altogether, the Warren Court in *Gideon v. Wainwright* held that the assistance of counsel in criminal prosecutions is essential to a fair trial and that this fundamental right is fully guaranteed in state courts by the fourteenth amendment. Writing for the majority, Mr. Justice Black, a long-time advocate of this position,[27] recognized "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[28] Although the Supreme Court's language is not altogether clear on this point, the *Gideon* requirement has apparently been applied only to felony cases, leaving very much in doubt the scope of the right to counsel in trials for minor offenses.[29]

Since the *Gideon* case, the Supreme Court has added little of constitutional significance to the right to counsel at trial.[30] In general the same may be said of the right to counsel at the preliminary hearing where the suspect is formally charged and requested to enter a plea. As early as 1961[31] the Warren Court gave limited formal recognition to the right to counsel at the critical preliminary hearing stage. The Court broadened the requirement in *White v. Maryland*,[32] decided just over a month after announcement of the *Gideon* ruling.[33] However, as previously noted, at the stages of police interrogation, lineup identification, and appeal, some far-reaching developments have occurred. It is clear in retrospect that *Gideon v. Wainwright*,[34] with its emphasis on a broad right to the assistance of counsel, and on uniform requirements for state and federal cases, paved the way for most if not all of the subsequent changes.

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26. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, ch. 5 (1955).

27. *See, e.g.*, his dissenting opinion in Betts v. Brady, 316 U.S. 455, 474-77 (1942).

28. 372 U.S. at 344.

29. *See* Annot., 18 L. Ed. 2d 1420 (1967); *Note, The Indigent Misdemeanant's Right to Counsel—an Extension of Gideon v. Wainwright*, 18 DRAKE L. REV. 109 (1968); Comment, *Constitutional Law—Right to Counsel—Valid Misdemeanor Conviction Cannot be used as Basis for Recidivist Sentence if Defendant Was Not Represented by Counsel at Misdemeanor Trial*, 43 N.Y.U. L. REV. 1012 (1968). For a detailed analysis of the *Gideon* case, its origins, argument before the Supreme Court, immediate aftermath, and general implications, *see* A. LEWIS, GIDEON'S TRUMPET (1964).

30. One development should be noted, however. In Burgett v. Texas, 389 U.S. 109 (1967) a divided Court, speaking through Mr. Justice Douglas, held that in a trial involving recidivist statutes, a prior Tennessee conviction obtained in violation of the *Gideon* requirement was inadmissible. "To permit a conviction in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." 389 U.S. at 115.

31. Hamilton v. Alabama, 368 U.S. 52 (1961).

32. 373 U.S. 59 (1963).

33. *See also* Walton v. Arkansas, 371 U.S. 28 (1962).

34. 372 U.S. 335 (1963).

Besides its recognition of the right to counsel at various stages in the criminal process, the Warren Court extended this guarantee to other types of cases. Of particular importance is the famous 1967 decision of *In re Gault*.[35] Eight justices agreed that, in juvenile delinquency proceedings leading to possible confinement in a state institution, a child is entitled under due process of law to the assistance of counsel, either retained or appointed.[36] The ensuing discussion touches on this extension of the right to counsel but gives more attention to changing requirements within the formal criminal process.[37]

Although the emphasis here is on expansion of the right to counsel, it should be remembered that the Supreme Court's post-*Gideon* decisions have not uniformly broadened this constitutional guarantee. On occasion the Warren Court in fact placed limits either on a right to the presence of counsel or on the alternatives available to a suspect, whether or not he is advised by a lawyer.[38] Amid controversy over judicial enlargement of constitutional rights, it is easy to lose sight of such limitations, but they too merit attention as an aspect of the Warren Court's performance in the criminal procedure field.

II. The Assistance of Counsel Preceding Arraignment

In a series of closely divided decisions, the Warren Court, between 1964 and 1967, extended the right to counsel to stages of police investigation traditionally thought to be outside the adversary system. First in *Escobedo v. Illinois*[39] the Court held that, in an investigation which has "begun to focus on a particular suspect"[40] who has been taken into custody and questioned, refusal to allow him to consult his attorney violates his sixth amendment right to the assistance of counsel, as applied to the states

35. 387 U.S. 1 (1967).
36. *Id.*
37. For a comprehensive discussion of various aspects of the *Gault* ruling see *Symposium on Juvenile Problems: In re Gault*, 43 IND. L.J. 523 (1968). *See also* Davidson, *In re Gault: The Juvenile's Gideon*, 56 ILL. B.J. 488 (1968); Fort, *Gault: Adversity or Opportunity*, 51 JUDICATURE 53 (1967); Case Comment, 44 NOTRE DAME LAWYER 158 (1968).
38. *See* Hoffa v. United States, 385 U.S. 293 (1967); Schmerber v. California, 384 U.S. 757 (1966).
39. 378 U.S. 478 (1964). For a detailed discussion of the historical antecedents of the *Escobedo* decision see Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000 (1964). *But cf.* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escoebdo v. Illinois*, 49 MINN. L. REV. 47 (1964).
40. 378 U.S. at 490-91.

by the fourteenth amendment.[41] Because the ruling in *Escobedo v. Illinois* was confined to the particular set of circumstances appearing in the record, its exact requirements and dimensions were very much in doubt. One important point seemed clear, however; the Supreme Court had largely abandoned the traditional due process standard by which it had frequently determined the admissibility of confessions and admissions as evidence in state courts. Just as *Gideon v. Wainwright*[42] had supplanted the *Betts v. Brady*[43] rationale, so the *Escobedo* decision appeared to replace the case-by-case approach that the Supreme Court had followed since 1936 in dealing with the problem of coerced confessions.[44] In both areas a highly flexible due process standard had been dropped in favor of a broad endorsement of access to defense counsel in state proceedings.[45]

With its decision two years later in *Miranda v. Arizona*,[46] the Court attempted to dispel the confusion produced by the *Escobedo* ruling. The majority of five, speaking through Mr. Chief Justice Warren, held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[47] Minimum rquirements for assuring these safeguards were summarized as follows:

> Prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily,

41. One month prior to *Escobedo* the Supreme Court held that a defendant was deprived of his right to counsel by the admission into evidence of incriminating statements made in the absence of his attorney. The statements were made during a conversation with an alleged confederate who had consented to install a radio transmitter in the defendant's automobile, thereby enabling a federal narcotics agent to overhear everything that was said. Unlike the situation in *Escobedo*, this incident occurred after indictment, while the defendant was free on bail. Nevertheless it dealt with the same broad question, the admissibility of statements elicited from the accused in the absence of his attorney. Massiah v. United States, 377 U.S. 201 (1964).

42. 372 U.S. 335 (1963).

43. 316 U.S. 455 (1942).

44. For a discussion of the pre-*Escobedo* approach to confessions see Ritz, *Twenty-five Years of State Criminal Confession Cases in the United States Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962); Spanogle, *The Use of Coerced Confessions in State Courts*, 17 VAND. L. REV. 421 (1964); Stephens, *The Fourteenth Amendment and Confessions of Guilt: Role of the Supreme Court*, 15 MERCER L. REV. 309 (1964); Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53 (1963).

45. *See generally* W. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES 10-26 (1966).

46. 384 U.S. 436 (1966).

47. *Id.* at 444.

> knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[48]

From a technical standpoint the emphasis of the *Miranda* decision differed from that of *Escobedo*. The latter ruling was based largely on the sixth amendment right to the assistance of counsel, while the former relied principally on the fifth amendment privilege against self-incrimination. Despite this apparent shift in constitutional emphasis, the *Miranda* majority regarded the "presence of counsel" as the "adequate protective device" by which police interrogation could be brought into conformity with requirements of the fifth amendment.[49] Of course the significance accorded to the presence of a lawyer during police questioning underscored the Court's expression of distrust as to what took place at private sessions of stationhouse interrogation. The Supreme Court had long been concerned about the problem of the "third degree" and about more subtle forms of psychological coercion often used to obtain incriminating statements.[50] But in the *Escobedo* and *Miranda* cases, a majority of the Justices were raising questions about the very existence of a system that permitted exertion of official pressure on a suspect to obtain evidence in a manner that would be unacceptable if conducted in open court.[51] This doubt was revealed by Mr. Justice Goldberg's assertion in *Escobedo* that:

> No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[52]

Apparently the Warren Court assumed that the deficiency in the law enforcement system noted by Mr. Justice Goldberg could

48. *Id.* at 444-45.
49. *Id.* at 466.
50. *See* Watts v. Indiana, 338 U.S. 49 (1949); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). *See also* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954).
51. This aspect of the problem of law enforcement within a constitutional framework is critically examined in Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 1 (A. Howard ed. 1965). *See also* Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21 (1965).
52. Escobedo v. Illinois, 378 U.S. 478, 489 (1964).

be remedied by the conversion of the system into something more closely resembling the adversary system. To most judges and lawyers the Court's assumption of the corrective quality of the adversary system might seem altogether reasonable. Members of the law enforcement profession, however, could hardly be expected to acknowledge that police methods are so deficient as to require the surveillance of the legal profession. In his dissent in *Escobedo v. Illinois*,[53] Mr. Justice Stewart took issue with the majority's assumptions concerning police methods. He drew a sharp distinction between criminal investigations and what he called "adversary litigative proceedings," insisting that the constitutional provisions in question were applicable only to the latter.[54] "Supported by no stronger authority than its own rhetoric," the majority of the Court had, according to Mr. Justice Stewart, converted "a routine police investigation of an unsolved murder into a distorted analogy of a judicial trial."[55]

Perhaps anticipating the renewed criticism that the *Miranda* decision would produce, the Court softened its immediate effect by declaring one week after deciding *Miranda* that the rulings in *Miranda v. Arizona* and *Escobedo v. Illinois* would not be applied retroactively.[56] Here, for the first time, the parallel with *Gideon v. Wainwright*[57] ended, *Gideon* having been given full retroactive effect.[58] While doubt still remains as to the precise scope of the *Miranda* decision, the Court indicated two years later, in *Mathis v. United States*,[59] that the new interrogation requirements are not confined merely to traditional stationhouse questioning. This view was reiterated in the 1969 decision of *Orozco v. Texas*.[60] Here the Court held that the *Miranda* requirements applied to statements made by a suspect in his own bedroom immediately after he was taken into custody by the police.[61] At the same time the Supreme Court has continued to rule upon con-

53. *Id.* at 493-95 (dissenting opinion).
54. *Id.* at 494 (dissenting opinion).
55. *Id.*
56. Johnson v. New Jersey, 384 U.S. 719 (1966); *cf.* Frazier v. Cupp, 394 U.S. 731 (1969). *See also* Davis v. North Carolina, 384 U.S. 737 (1966). In Jenkins v. Delaware, 395 U.S. 213 (1969) the Court held that *Miranda* requirements do not apply to the retrial of a defendant whose first trial began prior to June 13, 1966, the date of the *Miranda* decision.
57. 372 U.S. 355 (1963).
58. See Doughty v. Maxwell, 376 U.S. 202 (1964); Pickelsimer v. Wainwright, 375 U.S. 2 (1963); *cf.* Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965).
59. 391 U.S. 1 (1968).
60. 394 U.S. 324 (1969).
61. It should be noted that Mr. Justice Harlan, who strongly dissented from the *Miranda* and *Mathis* rulings, concurred in *Orozco* "purely out of respect for stare decisis. . . ." 89 S. Ct. at 1097 (concurring opinion). He added, however, that "the constitutional condemnation of this perfectly understandable, sensible, proper, and indeed commendable piece of police work highlights the unsoundness of *Miranda*." *Id.*

fession cases originating prior to *Escobedo* and thus not covered by the new standards.[62] In so doing it has relied explicitly on the due process approach to confession admissibility in state courts.[63] While, in a formal sense, this procedure is fully consistent with the non-retroactivity of *Escobedo* and *Miranda*, it is interesting that the Supreme Court has found occasion, since the latter decision, to restate in some detail the old "voluntariness" criteria.[64]

Although *Miranda v. Arizona* was more specific in its formal requirements than earlier Supreme Court decisions on police interrogation, it left several questions unanswered and presented some new difficulties. Of particular concern is the Warren Court's implicit assumption concerning the presence of counsel as a "protective device" at the interrogation stage. Can this stage be sharply separated from the earlier stage at which a suspect is given his warnings and required to decide whether he wants a lawyer? In other words, can an uncounseled suspect "knowingly and intelligently" waive his right to counsel during interrogation?[65] Furthermore, the Court in *Miranda* did not indicate the manner in which counsel for indigent suspects should be selected. Apparently the suspect would have some choice in the matter, but if he expressed no preference, who should then designate the suspect's attorney and what criteria would be employed? The basic question raised by the *Miranda* decision is whether the objectionable features of private police questioning are significantly modified by the constitutional requirements of warnings and waiver. Substantial data support the general conclusion that few changes in traditional patterns of interrogation have occurred since the decision.[66] Broad evaluation of a Supreme Court decision, however,

62. *See, e.g.*, cases cited note 63 *infra*.

63. *See* Frazier v. Cupp, 394 U.S. 731 (1969); Darwin v. Connecticut, 391 U.S. 346 (1968); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Brooks v. Florida, 389 U.S. 413 (1967); Beecher v. Alabama, 389 U.S. 35 (1967); Clewis v. Texas, 386 U.S. 707 (1967).

64. The Court also refused recently to consider the possible application of the Massiah v. United States, 377 U.S. 201 (1964), and *Escobedo* rulings to the admissibility of statements obtained by an "undercover agent" who was placed in jail with the suspect to elicit information about a murder. Without comment, the Court dismissed the writ of certiorari as improvidently granted. People v. Miller, 392 U.S. 616 (1968). Mr. Justice Marshall, joined by Mr. Chief Justice Warren and Mr. Justice Douglas and Mr. Justice Brennan, dissented. *Cf.* Biggers v. Tennessee, 390 U.S. 404 (1968).

65. *See generally* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967).

66. *See* Medalie, Zietz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Sta-*

involves more than assessment of its immediate implementation. Parallels in such areas as racial desegregation and school prayer are readily apparent.[67] Perhaps the *Miranda* decision is more important as an enlargement of the ideal of equal justice than as a practical basis of reform in police methods.

One year after the *Miranda* ruling, the Warren Court extended the right to counsel to police lineup identifications.[68] Recognizing that this form of eyewitness identification is susceptible to a variety of improper influences, the Court once more indicated its confidence in the capacity of the legal profession to shield a suspect from improper police methods. Writing for a sharply divided Court in *United States v. Wade*,[69] Mr. Justice Brennan conceded that the "risks" of lineup identification resulted not so much from "police procedures intentionally designed to prejudice an accused," but rather from "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[70] Like police interrogation, the lineup was seen as a "critical" stage in the criminal process. At this "pretrial confrontation," and possibly at similar instances of eyewitness identification not precisely covered by the term "lineup," the presence of a lawyer was required unless intelligently waived. The close kinship with interrogation requirements was also evident in the Court's refusal to give retroactive effect to the lineup rulings.[71] The Court acknowledged that the absence of a lawyer might be less crucial during "confrontation for identification" than at the trial itself.[72] Thus various stages in the criminal process might be regarded as "critical," but obviously some stages were less "critical" than others when it came to the specific application of a constitutional standard. Dissenting in *Stovall v. Denno*,[73] Mr. Justice Black sharply objected to such distinctions. Once having determined "what the Constitution says," Mr. Justice Black felt that the Supreme Court could not in the light of "countervailing interests . . . legislate a timetable by which the Constitution's provisions shall become effective."[74]

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tistical Study, 29 U. PITT. L. REV. 1 (1967); *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). *See also* THE IMPACT OF SUPREME COURT DECISIONS, 149-75 (T. Becker ed. 1969).

67. *See* School District v. Schempp, 374 U.S. 203 (1963); Cooper v. Aaron, 358 U.S. 1 (1958). *See generally* J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865 (1963).

68. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). *See generally* Alpert, *The Right to Counsel at Lineup*, 4 CRIM. L. BULL. 385 (1968).

69. 388 U.S. 218 (1967).

70. *Id.* at 235.

71. Stovall v. Denno, 388 U.S. 293 (1967).

72. *Id.* at 299.

73. *Id.* at 303 (dissenting opinion).

74. *Id.* at 304 (dissenting opinion).

In the lineup cases the Warren Court dealt with several closely related questions involving the scope of the right to counsel. Besides its restriction on retroactivity,[75] the Court refused to extend the constitutional guarantee of the right to counsel to such "scientific" procedures as the taking of handwriting samples,[76] and the analyses of a defendant's blood, fingerprints, clothing and hair.[77] The Court denied furthermore that the extension of the assistance of counsel to lineup identifications would impede effective law enforcement. The presence of counsel according to the Court might in fact prove beneficial to the prosecution by helping to prevent the introduction of improperly obtained evidence.[78] Despite this assertion and the Court's repetition of its statement in *Miranda v. Arizona*[79] that it was acting in the absence of legislative protection of procedural rights, these rulings did not occasion immediate or significant statutory reform. As previously indicated, the response in Congress was to challenge Supreme Court authority by attempting to overrule the interrogation and lineup identification decisions as they applied to federal cases.[80] Whether this congressional action significantly undermined the prestige or authority of the Warren Court is very much in doubt, but it did reflect the popular sentiment that too much had already been done for the criminal suspect.

III. The Assistance of Counsel After Conviction

On March 18, 1963, the date of its ruling in *Gideon v. Wainwright*,[81] the Warren Court held in *Douglas v. California*[82] that an indigent defendant is constitutionally entitled to appointed counsel on the first appeal of his conviction, where that appeal is recognized as a matter of right. Emphasis on the right of the poor to adequate appellate review appeared at least as early as 1956 when, in *Griffin v. Illinois*,[83] it was held that the due process and equal protection clauses of the fourteenth amendment barred a state from denying appellate review solely because of a defendant's inability to pay for a transcript of the record.[84] In the years

75. Stovall v. Denno, 388 U.S. 293 (1967).
76. Schmerber v. California, 384 U.S. 757, 764 (1966).
77. United States v. Wade, 388 U.S. 218, 227 (1967).
78. *Id.* at 238.
79. 384 U.S. 436 (1966).
80. Omnibus Crime Control and Safe Streets Act of June 19, 1968, Pub. L. No 90-351, tit. II, § 3501, 82 Stat. 210.
81. 372 U.S. 335 (1963).
82. 372 U.S. 353 (1963).
83. 351 U.S. 12 (1956).
84. For a recent enlargement of the principle established in *Griffin*, see Williams v. Oklahoma City, 395 U.S. 458 (1969).

since the *Douglas* case the Supreme Court has given substantial attention to the minimal requirements of *effective* representation on appeal. On more than one occasion it has recognized that the function of an attorney at the appellate stage is that of advocate, and not of amicus curiae.[85] The Supreme Court has expressed concern for the certainty of the appointment of counsel and for the quality of his representation.

With reference to the certainty of the appointment of counsel, a unanimous Supreme Court held in 1967 that the Missouri Supreme Court's failure to appoint counsel to represent a defendant on appeal violated his constitutional rights, even though there was some doubt that he had requested an attorney.[86] Although the defendant was represented by appointed counsel at trial, his attorney withdrew from the case after filing a motion for a new trial and a notice of appeal. In a per curiam opinion the United States Supreme Court reemphasized the important role played by appellate counsel. Even though the defendant had not clearly requested counsel at the appellate stage, the Court refused to assume that he had thereby waived his rights.[87]

A few weeks later the Court in *Anders v. California*[88] divided six-three in holding that on his first appeal an indigent is entitled to an appointed lawyer who, as an advocate, is required to "support his client's appeal to the best of his ability."[89] The California District Court of Appeal had appointed counsel to represent Charles Robert Anders on his first appeal. The lawyer notified the court by letter that he had reached the conclusion that the appeal was without merit.[90] After the state court's denial of his request for another attorney, Anders conducted his own appeal. His conviction was affirmed, and six years later the same court denied his application for habeas corpus. In the Supreme Court majority opinion reversing the state court denial of the habeas corpus application, Mr. Justice Clark maintained that counsel could and should have done more to represent his client's interests. His conclusion was, however, tempered by the following condition:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request

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85. *See* Entsminger v. Iowa, 386 U.S. 748 (1967); Hardy v. United States, 375 U.S. 277 (1964); Ellis v. United States, 356 U.S. 674 (1958). *See generally* Note, *The Obligation of Appointed Legal Counsel to Represent an Indigent on Appeal*, 17 DRAKE L. REV. 210 (1968).

86. Swenson v. Bosler, 386 U.S. 258 (1967).

87. *Id.* at 260.

88. 386 U.S. 738 (1967).

89. *Id.* at 744.

90 This procedure was later approved by the California Supreme Court in *In re Nash*, 61 Cal. 2d 491, 393 P.2d 405, 39 Cal. Rptr. 205 (1964).

> must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.[91]

The thrust of this requirement was that the court, and not counsel, should decide "whether the case is wholly frivolous."[92]

Mr. Justice Stewart, in a dissenting opinion[93] supported by Mr. Justice Black and Mr. Justice Harlan, observed that the majority's new requirement rested on the assumption that an appointed lawyer's statement in a no-merit letter could not be trusted. He rejected this assumption and insisted that the Court's recommended procedure was no better than that already followed in California. "The fundamental error in the majority opinion," he concluded, was "its implicit assertion that there can be a single inflexible answer to the difficult problem of how to accord equal protection to indigent appellants in each of the fifty states."[94] Obviously this aspect of federalism, if not altogether ignored by the majority, was regarded as no major limitation on the scope of fourteenth amendment rights in this area.

Thus far the Supreme Court's concern with the effectiveness of appellate counsel has not resulted in the prescription of detailed requirements comparable to the *Miranda* rules. The Court has not become involved in the dispute over the relative merits of the assigned counsel and public defender systems.[95] Perhaps this sort of controversy is outside the scope of comprehensive Supreme Court surveillance. The appointment of counsel in federal cases is controlled by the Criminal Justice Act of 1964,[96] itself apparently a response to such cases[97] as *Gideon v. Wainwright*[98] and *Douglas v. California*.[99] Some states have also undertaken legislative reform designed to provide greater legal assistance for indi-

91. 386 U.S. at 744.
92. *Id.*
93. *Id.* at 745 (dissenting opinion).
94. *Id.* at 747 (dissenting opinion).
95. *See generally* L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN STATE COURTS (1965). For a comparison of the assigned counsel and public defender systems see Neubauer, *Counsel for Indigents: An Empirical Examination of the Criminal Court Process* (a paper presented at the 1968 annual meeting of the American Political Science Association, Washington, D.C., September 7, 1968). *See also* Shamberg, *The Utilization of Volunteer Attorneys to Provide Effective Legal Services for the Poor*, 63 NW. U. L. REV. 159 (1968).
96. 18 U.S.C. 3006A (1964).
97. *See generally* Comment, *Implementing Justice: The National Defender Project*, 1 VALPARISO U. L. REV. 320 (1967).
98. 372 U.S. 335 (1963).
99. 372 U.S. 353 (1963).

gents.[100] It is significant that legislators have shown concern for the procedural rights of indigent defendants at a time of unusual judicial activity in this area. By contrast with congressional measures directed at police interrogation and related matters, most legislative activity concerning the appointment of counsel at trial and on appeal has been in harmony with Supreme Court decisions. This sharp dichotomy in legislative responses may be explained in part by the fact that the latter areas are much more readily identified with the adversary system as traditionally understood.

Although the Supreme Court has, since the early 1960's recognized the right to counsel at the "critical" stages of arraignment, trial and appeal, these earlier decisions do not automatically apply to all possible intervening stages in the criminal process. In the 1967 case of *Mempa v. Rhay*,[101] for example, the Warren Court explicitly recognized for the first time an unrestricted right to counsel at a post conviction hearing at which the trial judge revoked the defendant's probation and sentenced him to a term of imprisonment. Speaking for a unanimous Court, Mr. Justice Thurgood Marshall pointed out that in the *Gideon* case there was no "occasion . . . to enumerate the various stages in a criminal proceeding in which counsel was required."[102] However, a number of earlier cases, decided under the "special circumstances" rationale of *Betts v. Brady*,[103] made it clear, in the light of *Gideon*, "that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[104] The Court's ruling was confined to a particular type of postconviction proceeding, but Mr. Justice Marshall's language indicated a willingness to implement this protection on a broad scale.

A year later the Warren Court gave the *Mempa* decision retroactive application.[105] Noting that "decisions on a criminal defendant's right to counsel at trial, [citation omitted] at certain arraignments, [citation omitted] and on appeal [citation omitted]"[106] had also been given retroactive application, the Court found that the assistance of counsel "at sentencing is no different."[107] Here the right "must . . . be treated like the right to counsel at other

100. *See* Comment, *Gideon and Beyond: Achieving an Adequate Defense for the Indigent*, 59 J. CRIM. L.C. & P.S. 73 (1968).
101. 389 U.S. 128 (1967).
102. *Id.* at 134.
103. 316 U.S. 455 (1942).
104. 389 U.S. at 134.
105. McConnell v. Rhay, 393 U.S. 2 (1968); *cf.* Arsenault v. Massachusetts, 393 U.S. 5 (1968) (in which an unanimous Supreme Court gave retroactive application to the requirement that counsel be provided an indigent at the "critical" stage of arraignment); White v. Maryland, 373 U.S. 59 (1963).
106. 393 U.S. at 3.
107. *Id.*

stages of adjudication."[108] The Court's reference to "adjudication" might indicate its standard for differentiating between decisions applied retroactively and those given only prospective effect. The latter group includes such cases as *Miranda v. Arizona*,[109] *United States v. Wade*,[110] and *Mapp v. Ohio*,[111] in which the exclusionary rule implementing the fourth amendment was applied to the states through the fourteenth amendment.[112] Each of these cases involved the exercise of constitutional rights prior to the beginning of formal adjudicative proceedings. Thus, while the Warren Court was willing in the interrogation and lineup cases to give new dimensions to the adversary system, it was obviously not prepared to erase all formal distinctions between proceedings in the courtroom and criminal investigation by the police. It is also possible that refusal to apply these decisions retroactively turned in part on the Court's recognition of the hostility that they aroused among most law enforcement officers. No fully satisfactory explanation emerges, however, for holding that a single constitutional guarantee, such as the right to counsel, is given broader application in one area than in another. Although the Supreme Court has not decided questions of retroactivity in terms of the broad requirements of due process, it seems to have been concerned with the basic fairness of proceedings—the essence of the due procss requirement.[113]

IV. Other Dimensions of the Assistance of Counsel

In addition to the areas previously covered, the Supreme Court has in recent years examined a variety of situations in which the right to counsel received prominent, but not exclusive attention. In most of these situations the Court has enlarged the scope of the right, but a few restrictions have been established. For example, in *Schmerber v. California*[114] it was held that the defendant's constitutional rights including the right to counsel, were not violated by a compulsory blood test and use of the evidence thus obtained. By a five-four margin the Warren Court, through Mr. Justice Brennan, refused to extend the prohibition against self-incrimination to "real or physical," as opposed to "testimonial"

108. *Id.* at 4.
109. 384 U.S. 436 (1966).
110. 388 U.S. 218 (1967).
111. 367 U.S. 643 (1961).
112. *Id.*
113. *Cf.* Briethaupt v. Abram, 352 U.S. 432 (1957); Rochin v. California, 342 U.S. 165 (1952).
114. 384 U.S. 757 (1966).

evidence. According to the Court, Schmerber had "no greater right" merely because his lawyer "erroneously advised him that he could assert it."[115] The rationale of the decision was that counsel could assist the defendant only in the exercise of rights that the defendant clearly possessed.

In 1966 the Warren Court considered the question of whether defense counsel had the authority to enter a guilty plea "inconsistent with his client's expressed desire."[116] At issue was the defendant's constitutional right to a trial at which he could confront and cross-examine witnesses against him. The Court held that in such circumstances a defendant's constitutional rights "cannot be waived by his counsel. . . ."[117] Since most criminal convictions are based on guilty pleas and not on jury verdicts, the decision has far-reaching implications.[118] It is perhaps significant that, in a context other than the assistance of counsel on appeal, the Warren Court again indicated concern for the way in which counsel performs his duties.[119]

Not all right-to-counsel problems involve indigent defendants, as the Supreme Court recognized in another 1966 decision.[120] Ten years before, Walter F. Tellier had paid legal expenses in the course of a successful federal prosecution charging him, among other things, with a violation of the Securities Act of 1933.[121] On his income tax return for 1956, he attempted to deduct these expenses. The commissioner of internal revenue and the tax court refused to allow the deduction, but they were overruled by a United States Court of Appeals, whose decision in turn was affirmed by the United States Supreme Court. Mr. Justice Stewart, for a unanimous Court, declined "to distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress."[122] Tellier had incurred legal expenses as a result of exercising his constitutional right to the assistance of counsel. No reason existed for distinguishing them from other ordinary business expenses as defined by federal law.

The dimensions of the constitutional right to counsel transcend ordinary criminal proceedings.[123] This point is well illus-

115. *Id.* at 765.
116. Brookhart v. Janis, 384 U.S. 1 (1966).
117. *Id.* at 7.
118. It has been estimated that "up to nine out of ten convictions on serious charges are based on the defendant's admission of his guilt by a plea in court." Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 71 (1967). *See also* THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 134-37 (1967).
119. *Cf.* Anders v. California, 386 U.S. 738 (1967).
120. Commissioner v. Tellier, 383 U.S. 687 (1966).
121. 15 U.S.C. 77a-aa (1964).
122. 383 U.S. at 695.
123. *See* Holt v. Virginia, 381 U.S. 131 (1965), in which the Supreme

trated by the Warren Court's extension of the counsel requirement to juvenile delinquency proceedings.[124] Writing in 1966, Mr. Justice Fortas indicated the Court's awareness of widespread irregularities in the juvenile area:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.[125]

A year later, with its landmark decision in *In re Gault*,[126] the Warren Court directly confronted the problem of counsel in juvenile proceedings.

At the age of fifteen Gerald Gault was committed to the Arizona State Industrial School for a maximum of six years.[127] His commitment was apparently based solely on a neighbor's complaint that she had received an obscene telephone call. The case was characterized by a number of glaring procedural irregularities. Initially, Gerald was taken into custody without notice to his parents. Furthermore, the neighbor who made the allegation respecting the telephone call did not appear to testify at either of the two juvenile court hearings held prior to his commitment. No other witnesses were sworn and no permanent record was kept at these hearings. The boy was not advised of his right to remain silent, and neither he nor his parents were notified of his right to retained or appointed counsel.

Speaking again for the majority, Mr. Justice Fortas declared that the juvenile delinquency proceeding that characterized the *Gault* case violated the due process requirement. According to this decision, due process requires (1) written notice of the charge or allegations,[128] (2) notice to the child and his parents of his right to counsel,[129] (3) application of the privilege against self-incrimination,[130] and (4) the right of confrontation and cross-exam-

Court broadened its recognition of the right to counsel in contempt proceedings.

124. Kent v. United States, 383 U.S. 541 (1966).

125. *Id.* at 555.

126. *In re* Gault, 387 U.S. 1 (1967); *cf. In re* Whittington, 391 U.S. 341 (1968).

127. In the words of the juvenile court order he was committed "for the period of his minority [that is until twenty-one], unless sooner discharged by due process." 387 U.S. at 7-8 (bracketed material by the Court).

128. 387 U.S. at 31.

129. *Id.* at 34.

130. *Id.* at 42.

ination.[131] Mr. Justice Fortas outlined the history of the juvenile court movement and critically evaluated the assumptions underlying it. He reasoned that in theory the state, as parens patriae, serves as the child's protector, not as his prosecutor, thus permitting the exercise of maximum discretion by juvenile court authorities. In practice, however, he pointed out that the results have been far from satisfactory: "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[132] Reflecting the Court's sharp disapproval of the proceedings revealed by the record, Mr. Justice Fortas asserted that, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[133] He saw no essential difference between commitment to the state industrial school and commitment to prison. On the contrary, according to Mr. Justice Fortas this case differed from a criminal prosecution only in that greater procedural safeguards were available in the latter. Had Gerald Gault been over eighteen and tried as an adult for the alleged offense, the opinion noted "the maximum punishment would have been a fine of $5.00 to $50.00 or imprisonment in jail for not more than two months."[134]

While there was much disagreement among those voting for reversal,[135] only Mr. Justice Stewart dissented entirely from the *Gault* ruling.[136] He recognized the existence of "serious problems" in this area but was sure that they would not be solved by the Court's conversion of "a juvenile proceeding into a criminal prosecution."[137] Irrespective of the possible advantages or shortcomings of the *Gault* decision, its implications seem to be as far-reaching as those of *Gideon* and *Miranda.* In this single ruling a number of guarantees, implicit in the concept of due process of law, were applied to a system which, for more than half a century, was assumed to be outside the criminal process normally associated with those rights. The central role of the assistance of counsel in the exercise of other procedural rights here, as elsewhere, is apparent. In its absence the privilege against self-incrimination and the right of confrontation and cross-examination would be of little value.[138]

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131. *Id.*
132. *Id.* at 18.
133. *Id.* at 28.
134. *Id.* at 29.
135. Mr. Justice Black and Mr. Justice White wrote separate concurring opinions. *Id.* at 59, 64. Mr. Justice Harlan wrote an opinion concurring in part and dissenting in part. *Id.* at 65.
136. 387 U.S. at 78 (dissenting opinion).
137. *Id.* at 79 (dissenting opinion).
138. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966); Pointer v. Texas, 380 U.S. 400 (1965).

V. CONCLUSION

As the foregoing discussion suggests, post-*Gideon* decisions of the Warren Court in the right-to-counsel area share no single common theme. Nevertheless, several related factors are apparent in most of them, thus permitting some tentative generalizations. One such factor is the firm commitment to protection of the rights of indigents. This concern, of course, is by no means of recent origin. Poverty was one of the disadvantages shared by most defendants in the early right-to-counsel and coerced confession cases of the 1930's.[139] In those days, however, the Supreme Court focused its attention on the basic requirements of a fair trial, examining other stages in the criminal process only in the broad context of such requirements. Decisions of the Warren Court gave far more specific attention to the plight of the indigent suspect almost from the moment of his arrest forward. It has been estimated that each year at least 150,000 persons who cannot afford to pay for legal assistance are charged with felonies in state courts.[140] Accordingly, the dimensions of the problem with which the Warren Court attempted to deal are far greater than a handful of decisions might suggest. The Court during this period did not precisely identify the criteria by which, for constitutional purposes, a defendant may be classified as an indigent.[141] Many persons, not treated by trial courts as indigents can afford only partial payment of the expenses likely to be incurred during criminal proceedings. The Supreme Court has shown some inclination to deal with the question of effective representation by defense counsel in other contexts. Despite changes in the Court's personnel, it would not be surprising if some attention were given eventually to the problem of the defendant who cannot afford competent counsel but who at present does not fall into the category of individuals protected by the *Gideon v. Wainwright*[142] and *Douglas v. California*[143] rulings.

In expanding the assistance of counsel and related constitutional provisions, the Warren Court focused critical attention

139. *Cf.* Brown v. Mississippi, 297 U.S. 278 (1936); Powell v. Alabama, 287 U.S. 45 (1932). In these early cases most defendants were uneducated Negroes, tried in Southern states and often confronted with the threat of mob violence. The Court's recent concern for indigent defendants has transcended racial and sectional lines.

140. L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN STATE COURTS 7-8 (1965).

141. For a suggestion of willingness to consider this question see Wood v. United States, 389 U.S. 20 (1967).

142. 372 U.S. 335 (1963).

143. 372 U.S. 353 (1963).

during the post-*Gideon* period mainly on police procedures.[144] A majority of the Justices apparently assumed that the adversary system was threatened by a sharp procedural disparity between police methods and formal adjudication. They further assumed that the proper way to resolve this difficulty was to convert at least part of the investigatory process into something approaching the adversary system, but not on the other hand, to accommodate the adversary system to the alleged demands of criminal investigation. It should be noted that at least one important element of the adversary system, namely the presence of a judicial officer, a neutral third party standing between the prosecutor, as represented by the police, and defense counsel, is still missing from police interrogation and lineup identification, even where the Warren Court's rulings are faithfully followed. In the confrontation between officer and attorney, furthermore, the likely deficiency of legal knowledge on the part of the former further distorts the analogy between these preliminary stages and a formal adversary proceeding. Nevertheless, it seems unwarranted to assume that an attorney under such circumstances would abandon the adversary role that he is accustomed to filling in the courtroom. It is doubtful that, even if fully implemented, the *Miranda* requirements would remove the danger of undue police pressure against a suspect. Nothing short of an automatic requirement that interrogation be made public could achieve this objective. Given the bitter denunciation of its efforts merely to modify the conditions of private interrogation, even the Warren Court could not have been expected to take this step. The same difficulty does not necessarily apply to lineup identificaton where the police are seeking statements from individuals not in custody. A fundamental question applicable to this entire area is whether investigative techniques can conform to the procedures of an accusatorial system and at the same time continue to be relatively effective. Conversely, it may be asked whether criminal investigation can depart from procedural requirements, as it obviously has on many occasions, without destroying the integrity of the adversary system of criminal justice.

In addition to its concern for constitutional standards of criminal law enforcement, the Warren Court questioned the fairness of procedures within the juvenile court system. The *In re Gault*[145] decision left many questions unanswered and it is perhaps significant that the Court did not choose to deal with them more explicitly in subsequent cases. Of course, the extent to which the Burger Court[146] will apply constitutional requirements in this

144. *See* Ennis & Fraenkel, *Police Power and Citizens' Rights*, THE PRICE OF LIBERTY 165 (A. Reitman ed. 1968).

145. 387 U.S. 1 (1967).

146. The United States Supreme Court during the tenure of the Hon-

complex area remains in doubt. That the *Gault* case represents a major commitment to broad standards of due process, however, is beyond serious question. By contrast with juvenile delinquency proceedings, the Warren Court gave almost no attention to shortcomings in the formal criminal process, for example, the problem of prosecution-oriented trial judges.[147] Such attention might have compelled critical examination of a number of assumptions underlying the adversary system itself. This appraisal would have been difficult, particularly in view of the Warren Court's apparent belief that expanded application of the adversary system could remedy procedural abuses in other stages of the criminal process.

Whether, in the final analysis, the pressure of public opinion, the negative response of Congress, or changes in judicial personnel will influence a shift in the direction of constitutional development is, of course, a matter of speculation. It is true that after the close of its 1966-1967 term, the Warren Court attempted no enlargements of the right to counsel comparable to *Miranda v. Arizona*,[148] *United States v. Wade*,[149] *Anders v. California*,[150] or *In re Gault*.[151] However, considering the scope of expansion between 1964 and 1967, perhaps a slackened pace was to be expected. Certainly there is no conclusive evidence that the Court yielded to public pressure in this area. Indeed, during 1968 and 1969, it reaffirmed and sharpened the *Miranda* requirements and broadened the scope of other constitutional provisions, notably in the areas of search and seizure and double jeopardy.[152]

In all likelihood the Burger Court will have an opportunity to consider the constitutionality of congressional measures purporting to overrule the *Miranda* and *Wade* requirements as applied to federal law enforcement. Such a constitutional test would raise intriguing and often embarrassing questions about the ambiguous relationship between the judiciary and other branches of government in the realm of constitutional interpretation. It is too easy to forget that Congress and the President also play active parts in shaping the basic law. Obviously, the Constitution, despite

orable Warren E. Burger as Chief Justice of the United States, June 23, 1969, to present.

147. Supreme Court concern with this issue in its broadest dimensions is not, however, unprecedented. *Cf.* Tumey v. Ohio, 273 U.S. 510 (1927).

148. 384 U.S. 436 (1966).

149. 388 U.S. 218 (1967).

150. 386 U.S. 738 (1967).

151. 387 U.S. 1 (1967).

152. *See* Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968); *cf.* North Carolina v. Pearce, 395 U.S. 711 (1969); Benton v. Maryland, 395 U.S. 784 (1969); Chimel v. California, 395 U.S 752 (1969).

Charles Evans Hughes' famous phrase, is not always "what the judges say it is." Our governmental system has, however, usually operated under the assumption that constitutional adjudication has a right of finality, especially when it culminates in a full-opinion decision of the United States Supreme Court. Accordingly, even those justices who have criticized the interrogation and lineup identification decisions might refuse to endorse the nullification of those decisions via congressional enactment. Such direct subordination of the Supreme Court to Congress would pose difficulties even for many advocates of judicial self-restraint. Traditional regard for the independence and stature of the Supreme Court might in this situation overshadow intracourt disagreement on narrower questions of constitutional law and public policy.

Another factor may also operate to minimize further departures from controversial decisions of the Warren Court. Mounting evidence indicates that recent decisions have had a minimal impact on law enforcement. They have by no means had the devastating effect widely prophesied by an array of critics. Neither have they put an end, however, to the procedural abuses against which they were directed. Thus, for proponents as well as critics, these rulings may come to appear far less crucial over the next few years. The Supreme Court might even adopt new approaches to problems of law enforcement without formally abandoning its earlier guidelines.

Outside the areas of criminal investigation and juvenile court proceedings, recent extensions of the right to counsel have aroused little controversy. This is true even though several rulings call for major changes in the adversary proceeding as traditionally understood in this country. There is little reason to believe that the Supreme Court will suddenly lose interest in the quality not to mention the certainty, of legal defense in the courtroom. Moreover, the Supreme Court might have occasion to look more closely at such widespread practices as plea bargaining and in time to formulate constitutional standards applicable to this and related aspects of the informal contact between defense attorney and prosecutor.

It will be remembered that in its most widely criticized decisions the Warren Court was sharply divided. Mr. Justice Stewart and Mr. Justice White, usually joined by Mr. Justice Harlan, dissented from the interrogation and identification rulings.[153] From a purely quantitative standpoint, two or three changes in Supreme Court membership could convert this minority into a majority. In addition to personnel changes, however, numerous variables influence the course and tempo of constitutional change. The

153. They were joined in the *Escobedo* and *Miranda* cases by Mr. Justice Clark. It appears that Mr. Justice Clark's successor, Mr. Justice Marshall, is aligned with the *Miranda* majority.

nuances of particular cases, further refinement of the techniques of law enforcement, and subtle shifts in public attitudes suggest some of the more apparent variables. It is by no means certain, furthermore, that justices who dissented from a particular decision two or three years ago will automatically vote to overrule it at the first opportunity. Also it is not uncommon for new appointees to modify their views once they come into close contact with those already on the Court. Irrespective of the course of future decisions, much of what the Supreme Court has already said about the constitutional requirement of counsel has not yet been implemented. While it is recognized that implementation is not the only standard by which to evaluate Supreme Court performance, the question remains whether major decisions of the Warren Court requiring representation by counsel will eventually come to represent something more than distant, unrealized ideals.

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